No. 704

IN THE

Supreme Court of the United States

October Term, 1957

RUTH ELKHORN COALS, INC., ET AL., *Petitioners*

v.

JAMES P. MITCHELL, Secretary of Labor

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Ruth Elkhorn Coals, Inc., et al. (Petitioners) pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled cause on September 19, 1957.

OPINIONS BELOW

The judgment of the United States District Court for the District of Columbia is unreported and is reprinted in R. 85. The opinion of the Court of Ap-

peals has not yet been reported and is reprinted in Appendix A, *infra*, pp. 1a-7a.

JURISDICTION

The judgment of the Court of Appeals was entered on September 19, 1957 (App. A, *infra*, p. 8a). A timely petition for rehearing was denied on October 10, 1957 (Appendix A, *infra*, p. 9a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1) and Section 10 of the Walsh-Healey Act, 41 U.S.C. 43a .

QUESTION PRESENTED

Whether the Secretary of Labor acting under the Walsh-Healey Act has authority when coal is generally available in the open market to make a wage determination for the bituminous coal industry, in derogation of Section 9 of said Act (41 U.S.C. 43) which reads in pertinent part

> "This Act shall not apply to purchases of such materials, supplies, articles or equipment as may usually be bought in the open market . . . ."

on an interpretation that such exemption applies only to those purchases which the Government is by law permitted to make in the open market.[1]

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[1] As appears hereinafter, *infra*, p. 14, the area of permissible Government procurement in the open market is limited to purchases of two types: (1) purchases without advertising for bids under circumstances bringing the purchase within the exception to the General Purchase Statute, R.S. 3709, that is, where the public exigency requires immediate delivery of the goods; and (2) purchases of goods which the procurement agency is authorized by the express language of a statute to buy "in the open market". Section 13, Rulings and Interpretations under Walsh-Healey Public Contracts Act, No. 3, Department of Labor, Appendix B, *infra*, p. 13a.

STATUTE INVOLVED

The pertinent provisions of the Walsh-Healey Act, 49 Stat. 2036 et seq., 41 U.S.C. 35-45, and the General Regulations under the Walsh-Healey Public Contracts Act, 41 CFR § 201.2a; 41 USCA Appendix, § 201.2a (1958 Ed.), are set out in Appendix B, *infra,* pp. 10a-14a.

STATEMENT

By letter dated December 15, 1954, United Mine Workers of America, Pittsburgh Consolidation Coal Company, and Pocahontas Fuel Company, Inc., requested the Secretary of Labor to make a wage determination for the bituminous coal industry under the Walsh-Healey Act (R. 1). By notice dated December 30, 1954, the Acting Secretary of Labor gave notice that a public hearing would be held on February 1, 1955, before a hearing examiner to make such a wage determination (R. 2-4). Petitioners here representing some 305 bituminous coal operators in Virginia, West Virginia and Kentucky opposed the proposed $2.245 per hour minimum wage determination (R. 5-9). Among other contentions, these Petitioners asserted from the very beginning and offered to prove that the Secretary of Labor had no jurisdiction to fix a minimum wage applicable to the bituminous coal industry because coal is generally bought in the open market and therefore came within the "open-market" exemption of the statute (R. 86 ff). The Hearing Examiner refused to receive testimony or argument as to whether coal can be purchased in the open market. He did not consider this matter properly raised in this proceeding inasmuch as the Depart-

ment of Labor by regulation[2] had interpreted the "open market" exemption of the statute to apply only to those articles which the contracting officer for the Government is expressly authorized to purchase in the open market (R. 96-99). The Secretary therefore upheld the exclusion by the Hearing Examiner of any testimony or argument on applicability of the "open market" exemption to coal (R. 11).

Pursuant to Section 10 of the Walsh-Healey Act (41 U.S.C. 43a), Petitioners herein seasonably filed a complaint for injunctive relief against the Secretary of Labor in the United States District Court for the District of Columbia (R. 60-75), alleging, *inter alia,* that the wage determination was beyond the statutory authority of the Secretary of Labor because of the "open market" exemption, despite the Secretary's refusal to consider this issue (R. 64). In his answer to said complaint (R. 79-85), the Secretary stated: "Defendant [Secretary] denies that he determined that bituminous coal may not usually be bought in the open market, and further denies that he determined whether it is or is not exempt under Section 9 of the Walsh-Healey Public Contracts Act. He alleges that he ruled that the 'open market' exemption was a matter not properly raised at the administrative hearing. . . ." (R. 79). And again in said answer, the Secretary "admits that he has refused to consider, and has ruled that there cannot be raised in this proceeding, the plaintiffs' contention that bituminous coal is a commodity 'that may usually be bought in the open market' and is exempt therefore from the coverage of the Act" (R. 81).

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[2] Section 201.2a, General Regulations under the Walsh-Healey Public Contracts Act, 41 CFR § 201.2a; 41 USCA Appendix, § 201.2a (1957 Ed.), Appendix B, *infra,* p. 12a.

A preliminary injunction was granted. On the Secretary's motion to dissolve the preliminary injunction and for summary judgment, the District Court granted the Secretary's motion and upheld the Secretary's wage determination without any findings of fact or rulings of law (R. 85).

On appeal, the court below affirmed the District Court, holding that though the Secretary erred in ruling that the "open market" exemption issue could not be raised by Petitioners in the administrative proceeding, nevertheless as a matter of statutory interpretation, the "open market" provision did not exempt the bituminous coal industry from the Act. The court below did not expressly uphold the validity of the Regulation as such, but dealt solely with the question as one of statutory interpretation. It considered as important the "fact that since 1936 the exemption has been consistently interpreted and applied by the Secretary . . . to include only supplies purchased by the United States where the contracting officer is authorized by express language in a statute to purchase in the open market, or where the purchase is made without advertising for bids under circumstances bringing it within the exceptions to the General Purchase Statute, Rev. Stat. § 3709, as amended, 41 U.S.C. § 5 (1942), for example, when immediate delivery is required by public exigency" (App. A, *infra*, p. 5a).[3]

[3] This is a paraphrase of Section 201.2a, General Regulations under the Walsh-Healey Public Contracts Act, Appendix B, *infra*, p. 12a.

REASONS FOR GRANTING THE WRIT

There are three important reasons for granting the writ in this case.

1. The decision below raises a fundamental and important question of procedure in the relationship of the citizen and his government, and of the administrative agency and the reviewing court. In a situation in which the court decides that an issue raised by your Petitioners from the very first was improperly excluded from the administrative hearing and that Petitioner was entitled to present his case on this issue to the Hearing Examiner and the agency, is it appropriate for the reviewing court to decide that such presentation, despite the conceded erroneous denial of the right to make it—would have been fruitless, and to proceed to make a determination of the substantive issue?

2. The substantive determination on the "open market" exemption is an erroneous interpretation of an important Federal law. The court below conceded that, considering the language of the exemption alone, it can "arguably be construed to mean that if bituminous coal can be bought generally in the open market then the industry as such is exempt from the Act" (App. A, *infra*, p. 4a).

3. The scope of the "open market" exemption, which is the basic substantive determination contained in the opinion and decision below, is a matter of broad national interest. The language of the statute, in the opinion of your Petitioners, clearly means that an industry which produces materials which can be and ordinarily are purchased in the open market by ordinary purchasers is exempt from Walsh-Healey Act wage determinations. The difference between this

interpretation of the Walsh-Healey Act and that of the Secretary and the Court below is of momentous importance to a wide sector of American business and to very important Government purchasing operations. It is not an issue which has previously been determined by this Court. It is basic to administration of the Walsh-Healey Act.

Considering these reasons in order:

1. In limine, there is the question of the relationship of the reviewing court vis-a-vis the agency, where the court below proceeded to give its interpretation of the "open market" statutory exemption in the absence of a definite ruling thereon by the Secretary. The Secretary consistently ruled that the issue was premature. *Supra,* p. 4. The salutary rule[4] that the agency should make the determination in the first instance applies to questions of law as well as issues of fact. In *Panhandle Eastern Pipeline Company* v. *Federal Power Commission,* 324 U.S. 635 at 649, the question which had not been raised in the application for rehearing concerned the exemption under Section 1(b) of the Natural Gas Act (52 Stat. 821; 15 U.S.C. 717)

[4] In the ordinary instance, the objection is raised by one of the parties for the first time before the court on review and not before the agency. In such a situation this Court has consistently refused to permit the reviewing court to decide the issue *de novo. National Labor Relations Board* v. *Cheney Lumber Company,* 327 U.S. 385; *Unemployment Commission* v. *Aragon,* 329 U.S. 143, 155. The same rationale is applicable where the reviewing court attempts to decide an issue sua sponte. *Federal Power Commission* v. *Colorado Interstate Gas Company,* 348 U.S. 492. These cases, as well as the point being made here (where the issue is raised before the agency but the agency refuses to rule) merely reflect different facets of the settled principle that courts are precluded from passing on issues which have not been considered by the administrative body.

of a pipeline company's production and gathering facilities. See also *Marshall Field & Company* v. *National Labor Relations Board,* 318 U.S. 253, 255-256; *Todd* v. *Securities and Exchange Commission,* 137 F. 2d 475, 478 (C.A. 6).

2. Although the Secretary dealt with this issue in terms of a refusal to decide, it may be assumed that the practical effect of the wage determination here was to decide that the "open market" exemption of Section 9 of the Act is unavailing to these Petitioners. The court below on the other hand considered the issue "as one of statutory interpretation." As the court below stated: "We reach our result independently of the factual allegations made by appellants. We do not understand appellants to contend now that an administrative hearing upon the applicability of the exemption is required as a condition to our disposition of the question." (App. A, *infra,* p. 3a). Not only was an offer of proof made that coal is an article which can usually be bought in the open market (R. 96-99), but it appears the court below assumed this fact for purposes of its decision. The court below then proceeded to construe the "open market" exemption contrary to the plain language of the statute.

(a) The court below referred to the presence of three explicit exemptions in Section 9 of the Act—(1) perishables including dairy and livestock, (2) agricultural and farm products processed for first sale by the original producers, (3) any contracts made by the Secretary of Agriculture for the purchase of agricultural commodities or the products thereof—as indicating that Congress did not intend the "open market" exemption itself to have the meaning which these plain words import because the court concluded these articles (perish-

ables and agricultural products) are available for purchase in the open market. The inclusion of these specific exemptions does not justify limitation of the "open market" exemption. When the Walsh-Healey Act was introduced as S. 3055, 74th Cong., 1st Session (1935), it contained no exemption for purchases made in the open market. The only exemption was for "agricultural or farm products processed for first sale by the original producer . . .". And, as we shall show, *infra*, p. 11, the "open market" exemption was similar to a provision in the forty-year-old Eight Hour Day Law (37 Stat. 138 (1912), 40 U.S C. 325) which had uniformly been given the construction contended for by Petitioners here. Further, there is nothing in the legislative history of Section 9 which gives the slightest indication that the "perishables and agricultural products" exemptions were intended to limit the "open market" exemption. The "open market" exemption and the other exemptions (perishables and agricultural products) are each sui generis. The "perishables and agricultural products" exemption is available whether these products are available in the open market or not and whether purchased by the Government by bid or not. The Secretary has applied the "open market" exemption in Section 9 of the Act depending on how the Government purchases the articles, whereas the "perishables" exemption depends on the type of article, regardless of the manner of Government purchase. Yet each exemption applies to a class of articles and not to the manner of purchase.

Likewise, the opinion below relies upon a non-sequitur in finding a Congressional intent to limit the "open market" exemption because Government contracts for materials and supplies must be made with the manu-

facturer of or a regular dealer in the materials and supplies. Section 1(a) of the Act, 41 U.S.C. § 35 (a). This provision merely describes the persons who are entitled to contract with the Government, and not the materials and supplies covered by the exemption. A "regular dealer" can be one who deals regularly in goods not usually obtainable in the open market. If coal is exempt under Section 9, there is no point in determining who is a "regular dealer" in coal. The mere fact that coal may be handled by a "regular dealer" does not establish that coal is not exempt. Again, there is not one iota of legislative history showing that Congress intended Section 1 (a) to limit the "open market" exemption. And as we shall show, the legislative history is clear to the contrary.

(b) The court below relied on the fact that since 1936 the exemption has been consistently interpreted and applied by the Secretary to include only those purchases which the Government is authorized to make in the open market. This is a "bootstrap" argument. For it was not until the Fulbright Amendment, §66 Stat. 308 (1952), 41 U.S.C. 43a(b), Appendix B, *infra*, p. 11a, that review was permitted of the "applicability" of the Act. *Perkins* v. *Lukens Steel*, 310 U.S. 113 (1940) held that private parties had no standing to obtain such review; so that until 1952, the Secretary's interpretation was immune from attack. And in a somewhat similar situation where the argument was made that the agency had consistently interpreted the jurisdictional clause of a statute in a certain manner, this Court gave the ready answer that ". . . consistent error is still error".[5]

[5] *Phillips Petroleum Company* v. *Wisconsin*, 347 U.S. 672, 678, fn. 5.

(c) In contradistinction to the tenuous support in extraneous matters for the strained interpretation relied upon by the court below, the legislative history dealing directly with the "open market" exemption is unambiguous that Congress intended the language to be given the plain meaning contended for by Petitioners here. Almost identical language appears in the prototype of Walsh-Healey—the forty-year-old Eight Hour Day Law:

> "Nothing in section 324 of this title shall apply to contracts . . . for such materials or articles as may usually be bought in open market, except armor and armor plate, whether made to conform to particular specifications or not." (37 Stat. 138 (1912), 40 U.S.C. 325)

There is no dispute that by the time Walsh-Healey was introduced, the same language in the Eight Hour Day Law was construed to exempt articles which were standard in nature. 29 Ops. Attorney-General 324; 29 Ops. Attorney-General 543-45 (1912); 30 Ops. Attorney-General 24 (1913).[6] Moreover, this exemption in the Eight Hour Day Law was discussed during hearings on Walsh-Healey.[7]

The Congressional debate clearly shows that the legislators were dealing solely with the plain meaning

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[6] In referring to this unimpeachable fact, the court below stated:

> "We do not overlook competing considerations, including the relationship of the open market language to similar language in the earlier Eight-Hour Law, 37 Stat. 138 (1912), 40 U.S.C. § 325 (1952), which caused the latter to be given a narrower interpretation than we accord the present Act." App. A, *infra*, pp. 6a-7a.

[7] Hearings before a House Subcommittee on the Judiciary on H.R. 11554, 74th Cong., 2d Session 513 (1936).

of the language, and nowhere does it appear that any suggestion was made that the exemption was limited to those articles which the Government was authorized to purchase in the open market.[8] Mr. Celler, one of the proponents of the bill, took emphatic exception to the argument that "commonplace articles"—citing as examples, "ink and the paper and the linoleum and the seats and the seat tacks and what not in this very chamber"—would be subject to the Act, stating that these "very articles . . . could and would be purchased in the open market", citing the express language of Section 9 (80 Cong. Rec. 10,009). The proponent of the bill, Congressman Healey, found nothing ambiguous in the language of Section 9. He stated: (80 Cong. Rec. 10,016)

> "Mr. Chairman, in reference to the carpet on the floor and the tacks and various other articles of furniture which were pointed out so dramatically by the gentleman from New York (Mr. Wadsworth), I call attention to the language of the bill, which is *absolutely clear and understandable* the provisions of this bill 'shall not apply to articles that may usually be bought in the open market'." (Emphasis supplied)[9]

Earlier in the debate, in answer to a question by Congressman Clark of North Carolina whether Section

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[8] 80 Cong. Rec. 9992-10,025.

[9] If Congress intended to exempt only those articles purchased without competitive bidding, it knew how to do so. By the express terms of Section 12 of the Act (41 U.S.C. 45), the Act is "to apply to all contracts entered into pursuant to invitations for bids issued on or after ninety days from June 30, 1936 . . .". App. B, *infra*, p. 12a. cf *Addison* v. *Holly Hill Co.*, 322 U.S. 607, 614, 618.

9 exempted "things like manufactured lumber, cotton, furniture", Congressman Healey answered:

> "I call the gentleman's attention to the language of Section 9, the first sentence of which reads [quoting the open market exemption of Section 9]. I think this language is *very clear;* and in my judgment do not think it would cover the articles the gentleman has in mind." (Emphasis supplied). 80 Cong. Rec. 9993.[10]

3. Although the legislative history and the plain meaning of the language in Section 9 can leave no room for doubt that the Secretary and the court below have erroneously interpreted said section, at the very least, the court below recognized that there was a "deal of ambiguity in congressional discussions". App. A, *infra,* p. 6a. Since this ambiguity concerns the basic question whether the jurisdiction of the Secretary under the Act is to extend to all industry or is to be restricted as the Congress intended, this question is of national import.[11] By giving the exemption a construction which makes it applicable only to those purchases which the Government is authorized to make in the open market, the court below has rewritten the statute and in effect has deprived the exemption of its intended content. The result of this interpretation is

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[10] The colloquy which follows indicates quite clearly that Congressman Healey was speaking in terms of the coverage of the Act under the exemption, and not that articles of general use would not be exempted under the exemption. 80 Cong. Rec. 9993.

[11] With the vast extent of Government operations and procurement of materials, almost the entire national economy is subject to Walsh-Healey. Moreover, in coal mining, the producer or operator can never be sure that some of his coal may not be purchased by the Government, since coal is usually sold through dealers.

to make the Act applicable to all industry generally, despite the clear intent of Congress that the Act should have only limited application.[12] It is not open to question that the purchases which Government agents are authorized to make in the open market without advertising for bids are exceptional and only cover situations where immediate delivery is required by the public exigency.

The simple and undeniable fact is that Congress did not intend to blanket all industry within the frame of Walsh-Healey, as the Secretary's interpretation would do. Walsh-Healey is not a substitute for and rests on different considerations than the Fair Labor Standards Act, 52 Stat. 1060, 29 U.S.C. 201, where Congress dealt with the problem of minimum uniform wage standards for industry generally.

Since a suit to test the applicability of the Act can be brought against the Secretary of Labor only in the District of Columbia Circuit, no conflict exists with other circuits. However, the basic purpose of the Fulbright Amendment in 1952 was to afford judicial review of the very question in issue here—the "open market" exemption. It was the sponsor's conviction that the limited manner in which the Secretary construed the exemption was so clearly "contrary to the legislative intent that the courts cannot help but interpret it in the proper manner . . .". 98 Cong. Rec. 6531

[12] The Secretary, in his brief to the court below, conceded that the narrow interpretation evidenced by Regulation 201.2(a), *supra*, is "applicable generally *to all industries* subject to the Act" and "has sufficed for application *to all industries* . . ." (emphasis supplied). Brief for Appellee, No. 13569, C.A.D.C. pp. 10-11.

(1952).[13] Your Petitioners suggest that the Fulbright Amendment recognizes that this issue is of sufficient national importance warranting judicial review. In these circumstances, this Court should settle the applicability of this statute so important to the economy of the country.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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[13] The Fulbright Amendment, S. 2594, 82nd Cong., 2d Session (1952), originally amended Section 9 to make it abundantly clear that the "open market" exemption would apply "regardless of the method of procurement used by the government". Because opposition to the entire amendment developed, it was agreed that the major objective of affording judicial review would enable the courts to determine the correctness of the Secretary's narrow interpretation of Section 9 (98 Cong. Rec. 6529).

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,569

RUTH ELKHORN COALS, INC., et al., *Appellants*

v.

JAMES P. MITCHELL, Secretary of Labor, *Appellee*

Appeal from the United States District Court for the District of Columbia

Decided September 19, 1957

* * * * * * * * * * *

Before PRETTYMAN, FAHY and DANAHER, *Circuit Judges.*

FAHY, *Circuit Judge:* Appellants constitute part of the bituminous coal industry. They filed suit in the District Court against the Secretary of Labor, appellee, seeking invalidation of a determination by the Secretary, made under the Walsh-Healey Public Contracts Act,[1] of prevailing minimum wages in the industry. The effect of the determination considered with the Act is to require appellants, in any contract they might make with the Government to supply coal in an amount exceeding $10,000, to stipulate to pay not less than the determined minimum wages to persons appellants employ in furnishing the coal. The District Court granted the Secretary's motion for summary judgment and affirmed his determination of the prevailing minimum wages.[2]

The principal contention of appellants is that the Walsh-Healey Act does not apply at all to the bituminous coal

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[1] 49 Stat. 2036 (1936), as amended, 41 U.S.C. § 35 (1952).

[2] The purposes and plan of the Walsh-Healey Act have recently been described by this Court in *Mitchell* v. *Covington Mills, Inc.*, 97 U.S. App. D.C. 165, 229 F. 2d 506, and need not now be repeated in more detail than is contained in the foregoing paragraph of the opinion.

industry. They rely upon the provision of the Act that it "shall not apply to purchases of such materials, supplies, articles, or equipment as may usually be bought in the open market . . . ," 41 U.S.C. § 43 (1952), an exclusion which appellants urge includes bituminous coal. They raised this point in the administrative proceedings, where the Secretary ruled that it was premature. They renewed the contention before the District Court and press it here, asserting that they may obtain our review of the question under the Fulbright Amendment. Section 10(b) of the Act, 41 U.S.C. § 43(b) (1952), a part of that Amendment, provides:

> Review of any such wage determination, or of the applicability of any such wage determination, may be had . . . in the manner provided in section 1009 of Title 5 by any person adversely affected or aggrieved thereby, who shall be deemed to be any manufacturer of, or regular dealer in, materials, supplies, articles or equipment purchased or to be purchased by the Government from any source, who is in any industry to which such wage determination is applicable.

Notwithstanding this language, the Secretary urges that the question about the open market exemption is not reviewable in these proceedings. He says that the open market provision is concerned with the applicability of the wage determination, which according to its terms applies only to contracts subject to the provisions of the Act, from which it follows that any question as to the scope of the exemption can be raised only by way of defense in a contract enforcement action as permitted by section 10(c), 41 U.S.C. § 43(c) (1952). Under section 10(c) the applicability of the exemption to a particular contract may be judicially reviewed, notwithstanding the contract contains the stipulation required by the Act for payment of the minimum wages. *Mitchell* v. *Covington Mills, Inc., supra,* is cited as holding that only in this manner may the applicability of the exemption be judicially considered. But we think the case does not so hold, for we there pointed out

that "the complaints in these suits do not ask the court to determine"[3] whether the open market provision takes the bituminous coal industry as such entirely out of the operations of the Act, the very question now presented.

In our view the question thus stated may be judicially reviewed in these proceedings under section 10(b). Appellants are regular dealers in supplies of the bituminous coal industry. The wage determination is purportedly applicable to that industry. The "applicability of . . . such wage determination," as well as the wage determination itself, is sought to be reviewed. Supplies of bituminous coal are among those purchased or to be purchased by the United States. Appellants thus by the very terms of section 10(b) are persons adversely affected or aggrieved, and as such are given by that section the right to obtain judicial review of the wage determination and its applicability, even though they have not entered into a contract with the Government to supply bituminous coal. While judicial review of these questions is also available in an appropriate case under section 10(c), *Mitchell* v. *Covington Mills, Inc., supra,* n. 4, this does not preempt the right of review available under section 10(b). The plain language of the latter applies to appellants in the circumstances before the Court, the language is consistent with the purpose and intent of the Amendment of which the language is a part, and it should be given its plain meaning.

On the merits, however, we think the appeal must fail. We are unable to agree that the open market provision exempts bituminous coal from the Act,[4] or that error other-

[3] 97 U.S. App. D.C. at 168, 229 F. 2d at 509.

[4] Although in the administrative proceeding this question was not considered because deemed premature it need not now be remanded to the Secretary. The question is one of statutory interpretation. We reach our result independently of the factual allegations made by appellant. We do not understand appellants to contend now that an administrative hearing upon the applicability of the exemption is required as a condition to our disposition of the question.

wise impairs the validity of the Secretary's determination or the District Court's judgment.

As to the open market exemption: Appellant's contend it exempts this industry because bituminous coal is mined for general use and may be bought by the Government in normal competitive channels. Under this theory the Act would apply only to such things as were required by the Government to be made to order on its specifications. The Secretary, on the other hand, interprets the exemption to exclude from the coverage of the Act only purchases the Government itself is authorized to make in the open market.

The language of the exemption, considered alone, can arguably be construed to mean that if bituminous coal can be bought generally in the open market then the industry as such is exempt from the Act; but this language must be interpreted in the context of the whole statute, and with its purpose in mind. The Secretary calls attention to several passages in the statute which support his narrow interpretation of the exemption. For example, section 9 of the Act, 41 U.S.C. § 43 (1952), explicitly exempts "perishables, including dairy and livestock and nursery products." These are available for purchase in the open market. They need not have been singled out for exemption if open market availability was enough to exempt them. Explicitly exempted also are "agricultural and farm products processed for first sale by the original producers." The statute covers such products when subsequently processed, though they are available in the open market. Another instance is the explicit exemption of "any contracts made by the Secretary of Agriculture for the purchase of agricultural commodities or the products thereof." This would be superfluous were the statute inapplicable to products generally available in the open market. These explicit exclusions indicate that Congress did not intend the open market exemption itself to exclude supplies simply because they were available generally in the open market. The same indication inheres in the requirement of section 1(a), 41

U.S.C. § 35(a) (1952), that a contractor with the Government must be either the manufacturer of or a "regular dealer" in the supplies purchased; for a "regular dealer" is one who deals in goods which ordinarily are saleable in the open market.

With the foregoing we must also consider the basic purpose of the Act. As set forth in *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 507, and as repeated in our recent *Covington Mills* decision, this basic purpose is "to use the leverage of the Government's immense purchasing power to raise labor standards," and to do this on a scale which could hardly be possible under the narrow scope which would be accorded to the Act under appellants' broad interpretation of the exemption. Important also is the fact that since 1936 the exemption has been consistently interpreted and applied by the Secretary, as administrator of its provisions, to include only supplies purchased by the United States where the contracting officer is authorized by express language in a statute to purchase in the open market, or where the purchase is made without advertising for bids under circumstances bringing it within the exceptions to the General Purchase Statute, Rev. Stat. § 3709, as amended, 41 U.S.C. § 5 (1952), for example, when immediate delivery is required by public exigency.

When Congress was considering the first appropriation of funds for administering the Act inquiry was made of the Comptroller General whether the administrative interpretation or one which would give broad scope to the open market exemption as now claimed by appellants should be accepted. H. R. Rep. No. 433, 75th Cong., 1st Sess. 25. The Acting Comptroller General responded:

> To permit such exemptions under the present act, which relates only to supply contracts, would so restrict its operation as practically to nullify its other provisions. Consequently, as between that interpretation and the one adopted by the Secretary of Labor, I felt compelled to accept the latter—the plain terms

> of the provision being such as to admit of only one or the other of those two interpretations.
>
> Accordingly I have to advise that unless and until the matter be clarified by further legislation, I am constrained to concur in the interpretation placed on the provision by the Department of Labor.[5]

81 Cong. Rec. 2771. The Secretary's interpretation, brought thus forcibly to congressional attention, has persisted throughout the administration of the Act and has been the basis upon which appropriations have been made.

Considering the foregoing, and notwithstanding a deal of ambiguity in congressional discussions, we are impelled to resolve doubts against the interpretation sought by appellants. *United States* v. *Korpan*, 354 U.S. 271; *Baltimore & O. R. Co.* v. *Jackson*, 353 U.S. 325. See also *Brooks* v. *Dewar*, 313 U.S. 354. Otherwise there would be more to repudiate than to accept in the mass of historical, legislative, and administrative material bearing on the problem. We do not overlook competing consider-

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[5] The appropriations bill as reported by the House Appropriations Committee provided $265,000 for the Division of Public Contracts, which would administer the Walsh-Healey Act. This was considerably less than the amount requested. Chairman McMillan of the Committee reported that the lower figure was "a result of the doubt that the committee entertained as to the question of the purchase of goods in the open market." After the receipt of the Acting Comptroller General's opinion quoted above, Chairman McMillan moved to amend the appropriations bill to provide a higher figure for the administration of the Act. He stated that he did this because "the effect of . . . [the Comptroller General's] decision is to considerably expand the activities of this division over what would have been required had the interpretation favored by our subcommittee been placed on the law. In the light of these facts, I am moving to restore the amount that the committee cut from the estimates for the Division of Public Contracts." 81 Cong. Rec. 2770. The narrow interpretation of the open market exemption was approved by Congressman Healey, sponsor of the Act. 81 Cong. Rec. 2771-72. The Amendment was adopted by the House of Representatives, 81 Cong. Rec. 2773, and became law, 50 Stat. 299 (1937).

ations, including the relationship of the open market language to similar language in the earlier Eight-Hour Law, 37 Stat. 138 (1912), 40 U.S.C. § 325 (1952), which caused the latter to be given a narrower interpretation than we accord the present Act. But in all the circumstances of language, purpose and history the authority of the Secretary to make a determination of the prevailing minimum wages for the bituminous coal industry must be upheld.

The foregoing disposes of the principal contentions of appellants. We have considered, however, their other contentions, concerned with the sufficiency and competence of the evidence, the selection of production districts, and the correctness of different wages for districts covered by the determination, including the alleged inclusion therein of factors for which employers cannot be held liable because of the Portal-to-Portal Act, 61 Stat. 84 (1947), 29 U.S.C. § 251 (1952). We find among these contentions no basis for reversing the summary judgment granted by Judge Letts in favor of the Secretary.

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

April Term, 1957.

C. A. 5052-55

No. 13,569

RUTH ELKHORN COALS, INC., ET AL., *Appellants,*

v.

JAMES P. MITCHELL, Secretary of Labor, *Appellee.*

United States Court of Appeals
for the
District of Columbia Circuit
Filed Sept. 19, 1957
Joseph W. Stewart, Clerk

Appeal from the United States District Court for the District of Columbia.

Before: Prettyman, Fahy and Danaher, Circuit Judges.

Judgment

This cause came on to be heard on the record from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, It is ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

Dated: September 19, 1957.

Per Circuit Judge Fahy.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

October Term, 1957

No. 13,569

RUTH ELKHORN COALS, INC., ET AL., *Appellants*,

v.

JAMES P. MITCHELL, *Appellee*.

United States Court of Appeals
for the
District of Columbia Circuit
Filed Oct. 10, 1957
Joseph W. Stewart, Clerk

Before: Prettyman, Fahy and Danaher, Circuit Judges, in Chambers.

Order

Upon consideration of appellants' petition for rehearing, it is

ORDERED by the Court that the aforesaid petition be, and it is hereby, denied.

Per Curiam.

Dated: October 10, 1957

APPENDIX B

Walsh-Healey Public Contracts Act, as Amended. 49 Stat. 2036, 41 U.S.C. 35-45

SECTION 1. In any contract made and entered into by any executive department, independent establishment, or other agency or instrumentality of the United States, or by the District of Columbia, or by any corporation all the stock of which is beneficially owned by the United States (all the foregoing being hereinafter designated as agencies of the United States), for the manufacture or furnishing of materials, supplies, articles, and equipment in any amount exceeding $10,000, there shall be included the following representations and stipulations:

(a) That the contractor is the manufacturer of or a regular dealer in the materials, supplies, articles, or equipment to be manufactured or used in the performance of the contract;

(b) That all persons employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract will be paid, without subsequent deduction or rebate on any account, not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the locality in which the materials, supplies, articles, or equipment are to be manufactured or furnished under said contract;

* * * * * * * * * *

SECTION 2. Any breach or violation of any of the representations and stipulations in any contract for the purposes set forth in section 35 of this title shall render the party responsible therefor liable to the United States of America for liquidated damages * * *; and, in addition, the agency of the United States entering into such contract shall

have the right to cancel same and to make open-market purchases or enter into other contracts for the completion of the original contract, charging any additional cost to the original contractor. * * *

SECTION 4. The Secretary of Labor is authorized and directed to administer the provisions of sections 35-45 of this title and to utilize such Federal officers and employees and, with the consent of the State, such State and local officers and employees as he may find necessary to assist in the administration of said sections and to prescribe rules and regulations with respect thereto. * * * The Secretary of Labor or his authorized representatives shall have power to make investigations and findings as provided in sections 35-45 of this title, and prosecute any inquiry necessary to his functions in any part of the United States. The Secretary of Labor shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of sections 35-45 of this title. * * *

SECTION 9. Sections 35-45 of this title shall not apply to purchases of such materials, supplies, articles, or equipment as may usually be bought in the open market; nor shall they apply to perishables, including dairy, livestock and nursery products, or to agricultural or farm products processed for first sale by the original producers; nor to any contracts made by the Secretary of Agriculture for the purchase of agricultural commodities or the products thereof. * * *

SECTION 10(b). All wage determinations under section 35(b) of this title shall be made on the record after opportunity for a hearing. Review of any such wage determination, or of the applicability of any such wage determination, may be had within ninety days after such determination is made in the manner provided in section 1009 of Title 5 by any person adversely affected or aggrieved thereby, who shall be deemed to include any manufacturer of, or regular dealer in, materials, supplies, articles or equipment purchased or to be purchased by

the Government from any source, who is in any industry to which such wages determination is applicable.

SECTION 10(c). Notwithstanding the inclusion of any stipulations required by any provision of sections 35-45 of this title in any contract subject to said sections, any interested person shall have the right of judicial review of any legal question which might otherwise be raised, including, but not limited to, wage determinations and the interpretation of the terms "locality", "regular dealers", "manufacturer", and "open market". * * *

SECTION 12. Sections 35-45 of this title shall apply to all contracts entered into pursuant to invitations for bids issued on or after ninety days from June 30, 1936.

General Regulations Under the Walsh-Healey Public Contracts Act

SECTION 201.2 (Statutory Exemptions).—Inclusion of the stipulations enumerated in Sec. 201.1 is not required in the following instances:

(a) Where the contracting officer is authorized by the express language of a statute to purchase "in the open market," or where a purchase of articles, supplies, materials or equipment, either in being or virtually so, is made without advertising for bids under circumstances bringing such purchase within the exception to the General Purchase Statute, R.S. 3709, that is, where immediate delivery is required by the public exigency.

(b) Where the contract relates to perishables, including dairy, livestock, and nursery products ("perishables" cover products subject to decay or spoilage and not products canned, slated, smoked, or otherwise preserved);

(c) Where the contract relates to agricultural or farm products processed for first sale by the original producers;

(d) Whether the contract is by the Secretary of Agriculture for the purchase of Agricultural commodities or the products thereof;

* * * * * * * * * * *

UNITED STATES DEPARTMENT OF LABOR

PUBLIC CONTRACTS DIVISION

Rulings and Interpretations No. 3
(Rev. 1953)

SECTION 13. Open-Market Purchases.

(a) The Public Contracts Act does "not apply to purchases of such materials, supplies, articles, or equipment as may usually be bought in the open market." The Act, section 9.

(b) The stipulations set forth in the Act and section 201.1 of the Regulations need not be included in the contract "where the contracting officer is authorized by the express language of a statute to purchase 'in the open market,' or where a purchase of articles, supplies, materials, or equipment, either in being or virtually so, is made without advertising for bids under circumstances bringing such purchase within the exception to the General Purchase Statute, R.S. 3709, that is, where immediate delivery is required by the public exigency." — Regulations, section 201.2(a).

(c) Open-market purchases in a general sense include purchases made at places where the particular articles are bought and sold in the manner in which purchases are ordinarily made between individuals, that is, without advertising for bids. However, the open-market purchase exemption in the Public Contracts Act (sec. 9) by its terms applies only to such purchases as the Government usually makes in the open market.

(d) The usual method of open-market procurement by the Government includes purchases of two types: (1) purchases without advertising for bids under circumstances bringing the purchase within the exception to the General Purchase Statute, R.S. 3709, that is, where the public

exigency requires immediate delivery of the goods; and (2) purchases of goods which the procurement agency is authorized by the express language of a statute to buy "in the open market." Therefore, section 9 of the Public Contracts Act exempts only purchases of the above two types. The mere fact that the procurement agency is authorized to buy "without regard to the provisions of R.S. 3709" is not controlling.